No. 3779

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,
Appellants,

vs.

W. R. CARPENTER & CO., LTD. (a corporation), and WOLFF, KIRCHMANN & CO. (a corporation),
Appellees.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellants.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO.

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Appellees.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from an order of the United States District Court quashing the service of a foreign attachment levied against Wolff, Kirchmann & Co., a corporation, as garnishee. The appellants, libelants below, are copartners engaged in the shipping and commission business at San Francisco, under the firm name of Atkins, Kroll & Co. The appellee, W. R. Carpenter & Co., Limited, respondent below, is an Australian corporation, and had no officer or agent within the jurisdiction of the court, and had no goods, credits or effects within the juris-

diction, other than 300 shares of the capital stock of Wolff, Kirchmann & Co., which were attached under the process of the court.

The effect of the discharge of the foreign attachment was to release the shares of stock and place them beyond the reach of the process of the court, and virtually ended libelants' action against the respondent.

The libel, which was filed on April 24, 1919, alleged the breach by respondent of three contracts of affreightment whereby respondent had agreed to furnish to certain schooners operated by libelants, full cargoes of copra for three voyages from Sydney, Australia, or other named ports, to San Francisco, and to pay to libelants, freight money at agreed rates per ton; the libel further alleged damages to libelants aggregating $94,360, and concluded with a prayer for process against the respondent with the usual clause of foreign attachment:

> "that in case respondent cannot be found, then that its goods and chattels be attached to the amount sued for; and that, if sufficient goods and chattels cannot be found, its credits and effects be attached in the hands of American Trading Company, and of Wolff, Kirchmann & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hands; and that the said garnishees may be cited to appear and answer on oath as to credits and effects in their hands and belonging to said respondent; and that this Honorable Court would be pleased to decree," etc.
>
> (Apostles, p. 27.)

At the end of the libel was an order by the court for the issuance of process, as follows:

> "Let process issue as prayed for."
> (Apostles, p. 28.)

On the same day on which the libel was filed there was issued a citation directed to the respondent, which was afterwards filed, with the return of the U. S. Marshal endorsed thereon, as follows:

> "I hereby certify and return, that on the 24th day of April, 1919, I received the attached citation and that after diligent search, I am unable to find the within named respondent, W. R. Carpenter & Co., Ltd., a corporation, within my district.
>
> J. B. Holohan,
> United States Marshal,
> By Harold Maguire,
> Deputy United States Marshal."
>
> (Apostles, p. 5.)

On the same day, to-wit, April 24, 1919, there was issued also a citation and writ of foreign attachment directed to the garnishees American Trading Company, and Wolff, Kirchmann & Co., and said process was served upon said garnishees by a deputy United States marshal on the following day (Apostles, pp. 5, 6, 7, 30-33).

This process in foreign attachment recited the filing of the libel, and directed the marshal, *inter alia,* to attach the respondent's

> "credits and effects to the amount sued for, in the hands of American Trading Company, and of Wolff, Kirchmann & Co., garnishees, and

of any other garnishees having credits and effects of said respondent in hand, and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf."

(Apostles p. 31.)

The service by the marshal of this writ of foreign attachment, which has been attacked by counsel for respondent, and which was the basis of the order of the District Court dissolving the attachment, is set forth in the following return:

"UNITED STATES MARSHAL'S RETURN OF SERVICE OF CITATION WITH ORDER FOR FOREIGN ATTACHMENT.

I hereby certify and return that I received the attached citation with order for foreign attachment, at San Francisco, California, on April 24, 1919, and after due and diligent inquiry made, I am unable to find the respondent, W. R. Carpenter & Co., Ltd., a corporation, or any goods and chattels of said respondent, within my district.

I further return that at San Francisco within the said Northern District of California, on the 25th day of April, 1919, I attached all the credits and effects of W. R. Carpenter & Co., Ltd., a corporation, not to exceed the sum of $94,360, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the hands or under the control of Wolff, Kirchmann & Co., a corporation, by handing to and leaving a copy of the attached citation and order for foreign attachment with Mr. A. E. Wolff, president of said corporation, personally, and admonishing him of the remedy demanded by said citation and order.

I further return that I cited and admonished said garnishee, Wolff, Kirchmann & Co., a corporation, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of May, 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the above-named respondent, and to do and abide by what may be required of them in this behalf.

J. B. HOLOHAN,
U. S. Marshal,
By Harold Maguire,
Deputy.

San Francisco, California, April 25, 1919."

(Apostles, pp. 32, 33.)

There were two garnishees, the American Trading Company and Wolff, Kirchmann & Co. A part of the record on this appeal relates to the American Trading Company attachment, which was first dissolved by the District Court. Subsequently the attachment against Wolff, Kirchmann & Co. was dissolved upon substantially the same grounds that had been urged on the motion to dismiss the American Trading Company attachment. In order to place the facts fully before this court, it was necessary to include in the apostles much that related to the American Trading Company attachment, including the opinion of the District Judge on the motion to dismiss (Apostles, p. 49), and a stipulation in regard to the facts of the American Trading Company attachment (Apostles, p. 38). The Wolff, Kirchmann Co. attachment only, is involved in this appeal.

After the service of the process of foreign attachment was made upon Wolff, Kirchmann & Co., the garnishee served and filed an answer in the form of a verified statement, which answer recited:

> "That at the date the United States Marshal handed it a copy of the writ herein, it had no goods and chattels or credits and effects belonging to said W. R. Carpenter & Co., Ltd., a corporation, respondent in the above-entitled action, nor has it since had any; that said W. R. Carpenter & Co., Ltd., a corporation, owns 300 shares of stock of said Wolff, Kirchmann & Co., Inc., of a par value of $100 each; that said shares of stock are fully paid up.
>
> Dated, May 22, 1919.
>
> WOLFF, KIRCHMANN & CO., INC.,
> By Alfred E. Wolff,
> President.
> WILLIAM DENMAN,
> Proctor for Wolff, Kirchmann & Co., Inc."
>
> (Apostles, p. 35.)

It will be noted that the same proctor who appeared for the garnishee, appeared later for the respondent, and moved to set aside the attachment on the ground that the garnishee had not received notice.

Thereafter, in July, 1919, an amended statement of said garnishee was served and filed. By this amendment the garnishee added to paragraph I of the original statement, the following sentence:

> "That at the time of the receipt of said copy of said writ the said W. R. Carpenter and Co., Ltd., appeared in the books and records of the

said Wolff, Kirchmann & Co., Inc., as the owner of said 300 shares of stock.

Dated: July 10th, 1919.

WOLFF, KIRCHMANN AND CO., INC.,
By Alfred E. Wolff,
President.

WILLIAM DENMAN,
Proctor for Wolff, Kirchmann & Co., Inc."

(Apostles, p. 37.)

The next step relative to the Wolff, Kirchmann & Co. attachment was taken in January, 1920, when the proctors for the libelants served and filed a notice of motion for the delivery of the property in the hands of the garnishee (Apostles, p. 11). On January 31, 1920, the garnishee filed an answer to the motion of libelants, accompanied by an affidavit by the proctor for the garnishee (Apostles, p. 11). On September 4, 1920, libelants' motion for delivery of shares of stock by the garnishee was withdrawn (Apostles, p. 12).

In the meantime proceedings had been taken relative to the American Trading Company attachment to ascertain if that garnishee had any credits or effects of the respondent in its possession when the writ was served. The matter was referred to the United States Commissioner to take and report the testimony upon the issues. Those proceedings continued from time to time until September 18, 1920, when the exceptions to the commissioner's report were argued before the United States District Judge and were ordered submitted (Apostles, p. 12).

During all of the time subsequent to the service of the process on April 25, 1919, until September 28, 1920, no steps were taken by any of the parties to dissolve either of the attachments. On the latter date, the respondent, appearing specially by the same proctor who had represented Wolff, Kirchmann & Co. in the attachment proceedings, filed a motion to vacate the attachment against *the American Trading Company* (Apostles, p. 12), alleging thirteen grounds why the attachment should be vacated, the first twelve of said grounds being identical with the first twelve grounds in its subsequent motion to vacate the attachment against Wolff, Kirchmann & Co. (Apostles, p. 39).

The motion to vacate the American Trading Company attachment came on for hearing before the District Court and was argued and submitted, and on May 27, 1921, an opinion was filed and an order entered granting the motion to vacate the service of attachment upon the garnishee (Apostles, pp. 13, 49) (273 Fed. 828).

The court held that Rule 11 of the District Court, requiring notice of the property attached to be given to the garnishee, had not been complied with by the marshal, and that there had been no valid service of the attachment (Apostles, pp. 52-3).

Thereafter, on June 3, 1921, and more than two years after the attachment had been served upon Wolff, Kirchmann & Co., as garnishee, the respondent appeared specially and moved to vacate the

Wolff, Kirchmann & Co. attachment (Apostles, p. 15).

The motion set forth thirteen alleged grounds why the attachment should be vacated, as follows:

> "1. That no citation in the nature of a summons to appear and answer to the suit has been issued herein, as required by the rules of this court, or at all.
>
> 2. That the court has not ordered the issuance of a citation or any proper process herein.
>
> 3. That no attempt has been made to find the respondent in the said district by the United States marshal, or at all.
>
> 4. That no attempt has been made by the marshal to find or attach any of respondent's goods and chattels in the said district for the amount sued for, or at all.
>
> 5. That the marshal has not attached any of respondent's credits and effects in the hands of Wolff, Kirchmann Co. because: the marshal did not serve upon said Wolff, Kirchmann & Co. any form of attachment, complying with the rules of said court, by leaving a copy thereof with Wolff, Kirchmann & Co., or at its usual residence or place of business.
>
> 6. That the marshal has not attached any of respondent's credits and effects in the hands of Wolff, Kirchmann & Co. because the marshal did not leave with said Wolff, Kirchmann & Co. at its usual residence or place of business, or at all, any notice of the property attached.
>
> 7. The marshal did not at any time request Wolff, Kirchmann & Co. to deliver up to the Marshal any property, effects or credits named in said purported process, or at all, but simply, without giving Wolff, Kirchmann & Co. any opportunity to deliver up, or to know that it might deliver up such, or any property to the

marshal, handed to the said Wolff, Kirchmann & Co. a copy of the purported form of attachment returned by the marshal herein, and immediately left the said Wolff, Kirchmann & Co., before it had an opportunity to read the same.

8. That no summons was served on garnishee, Wolff, Kirchmann & Co., to appear before said Court, as provided in the monition issued herein.

9. That the said Wolff, Kirchmann & Co. was at no time cited to appear and answer on oath.

10. That no due or other proof of demand, (1) as to the first cause of libel, or (2) as to the second cause of libel, or (3) as to the third cause of libel or as to any or all causes of libel herein, has been made first or at all to the said court.

11. That no due or other proof of the propriety of the attachment has been made to the court.

12. That the specific property in the hands of Wolff, Kirchmann & Co. has not been stated in the libel, or in the process.

13. That at the time of the attempted levy of the said attachment, there were no property, credits or effects of, or due or owing to, the respondent, W. R. Carpenter & Co., Ltd., in the hands of, or under the control of, said Wolff, Kirchmann & Co.; that at said time it appeared upon the books of said corporation that certain stock in the said corporation had been issued to the respondent; but at the time of the attempted attachment and garnishment herein, respondent was not the owner of the said stock, and the said stock was not due or owing to it, nor was it in the hands or under the control of said Wolff, Kirchmann & Co."

(Apostles, pp. 55-57.)

In support of the motion there was filed an affidavit by A. E. Wolff, representative of Wolff, Kirchmann & Co., in which he stated:

> "That on or about the 25th day of April, 1919, a young gentleman, whom he now understands to be Mr. Maguire, a deputy United States marshal, approached him in the office of Wolff, Kirchmann & Co. Mr. Maguire asked affiant whether he was authorized to accept process for Wolff, Kirchmann & Co., and affiant answered that he was authorized to accept such process. Mr. Maguire then handed him a copy of the writ of attachment addressed to the marshal, and retired before affiant had an opportunity to read the document. There was no discussion of any kind between affiant and Mr. Maguire as to the property attempted to be attached by the service of the document, nor was there any discussion of the contents of the document. Affiant was at no time requested to deliver to Mr. Maguire, as deputy marshal, or otherwise, any property which he or Wolff, Kirchmann & Co. might have had belonging to respondent in this case. Affiant did not decline to deliver up to the marshal any property, effects or credits named in the said document, or at all. He was not given an opportunity to do this, nor was he at any time advised that he was entitled to or expected to deliver up or pay to the marshal any property, effects or credits of any kind. No other document was served on him at any time."
>
> (Apostles, pp. 59-60.)

Note that the affiant does not state that he did not receive notice of the property attached. The answer filed by the garnishee shows that he did receive the notice.

This was the *only affidavit filed, or showing of any kind made,* by respondent in support of its motion to vacate this attachment. It is true that in the notice of motion counsel referred to the "pleadings, orders, process and return and all documents on file herein", but none of the "documents" referred to relate to the Wolff, Kirchmann & Co. attachment.

The motion came on for hearing, and on July 2, 1921, the District Court entered an order vacating the attachment. No opinion was filed, but the court followed its previous ruling in the matter of the American Trading Company attachment (Apostles, p. 40). From this order the libelants have appealed to this court and have filed the following:

Assignment of Errors.

I.

"The District Court erred in finding that no notice of the property attached was given to the garnishee above named.

II.

The District Court erred in finding that Rule 11 of the District Court rules requires that in addition to leaving a copy of the foreign attachment with the garnishee, there must also be left with him 'a notice of the property attached'.

III.

The District Court erred in finding that there was no valid service of the attachment upon the garnishee above named.

IV.

The District Court erred in granting respondent's motion to vacate the attachment against the above named garnishee."

(Apostles, p. 64.)

Argument.

We will confine our discussion principally to the alleged ground upon which the District Court vacated the service, namely: that no notice of the property attached was given to the garnishee. None of the other twelve alleged grounds were considered by the court, and no showing was made by respondent in support of them.

The thirteenth alleged ground,

> "that at the time of the attempted levy of the said attachment, there were no property, credits or effects of, or due or owing to, the respondent, W. R. Carpenter & Co., Ltd., in the hands of, or under the control of, said Wolff, Kirchmann & Co.," etc.

would not, if true, affect the validity of the attachment, nor would it be a ground for setting aside the service of the writ. That issue would be properly raised by the answer of the garnishee, but not on a motion to quash *the service* of the writ. It has never been before the court for decision.

The decision of the District Court was on the ground, as set forth in the opinion, that

> "the only service on the garnishees was by leaving a copy of the process with them."
>
> (Apostles, p. 51.)

Admiralty Rule 11 of the District Court is set forth in the opinion, to show the manner of service of a foreign attachment, and is as follows:

> "When the property, effects, or credits named in any process of foreign attachment, are not delivered up to the marshal by the garnishee or are denied by him to be the property of the party defendant, *it shall be a sufficient service of such foreign attachment to leave a copy thereof* with such garnishee, or at his usual residence or place of business, *with notice of the property attached.*"
>
> (Apostles, p. 51.)

The opinion then states:

> "In addition to leaving a copy of the foreign attachment with the garnishee this rule requires that there *also be left with him 'a notice of the property attached.'* "
>
> (Apostles, p. 52.)

Compare this last quotation with the wording of the rule and note the difference.

The rule states:

> "a copy thereof * * * with notice of the property attached."

The opinion reads:

> "in addition to leaving a copy * * * there must *also* be left * * * *a* notice of the property attached."

This is a material difference. Under the wording of the rule there is a sufficient service *if the*

process gives notice of the property attached. The rule does not specify a separate notice, nor does it require that in addition to the process there shall be *also* a notice of the property attached.

It may be urged that this is a technical distinction, but it must be remembered that the service of the attachment has been attacked on hyper-technical grounds more than two years after the service was made, and that the appellants are before this court because of the technicalities which have been urged by respondent to prevent a decision of this case upon the merits.

The opinion of the court then states:

> "The old rule required only that a copy of the foreign attachment be left with the garnishee. The words 'with notice of the property attached' were added for a purpose, and I believe that purpose was to make the manner of service conform to the manner of service of writs of attachment under the state law. The New York rules, from which the rule of this court was taken, formerly provided that service might be made by leaving a copy of the attachment with the garnishee, but that rule has been amended so that it too now requires that *a* notice of the property attached be *also* left with him. This manner of service conforms both here and in New York to the manner of service of an attachment in each State. There are many decisions in each state holding that the giving of a notice of the property attached is essential to a valid garnishment."
>
> (Apostles, p. 52.)

In other words, the District Judge was of the opinion that prior to 1916, when the rules were

amended, no notice to the garnishee was necessary, but that when the rules had been changed to conform to the state practice, a separate notice to the garnishee became necessary. Is this correct? We have been unable to find any authority to support this view, and an examination of the rules and the decisions of the courts of both districts, shows that it is erroneous.

The "old rule" referred to by the District Judge was in the admiralty rules of the District Court for the Southern District of New York, which were followed in the Northern District of California, prior to 1916, when the present admiralty rules were adopted.

(Preface to District Court Rules, p. v.)

Rule 30 of the New York old rules, adopted in the year 1838, provided:

> "When the property, effects or credits named in the process are not delivered up to the marshal by the garnishee or trustee, or are denied by him to be the property of the party, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such trustee, or at his residence or usual place of business, unless the libelant shall by competent surety indemnify the marshal for arresting the property pointed out to him."

(Dunlap's Admiralty Practice, p. 333.)

There was no mention in the rule of notice to the garnishee, yet, nevertheless, a notice to the garnishee was just as essential as it was after the rules were amended, but the notice did not need to be a separate notice apart from the writ.

The opinion of Judge Blatchford in the case of *Cushing v. Laird,* (D. C., N. Y.) 6 Fed. Cs. No. 3508, contains a lengthy discussion of the manner of serving a writ of foreign attachment on a garnishee:

> "The attachment of credits and effects in the hands of a garnishee may be made, without actual levy on or arrest thereof, *by the service* on the garnishee *of a notice* apprising him of what the process demands, and for what cause, and warning him of the time and place when he must appear before the court and respond concerning the existence of such credits and effects and their status. Ben. Adm. 430; Conk. Adm. 481."

Here is stated the fundamental requirement in the service on the garnishee. There must be a notice of the property attached. How must that notice be given? The opinion continues:

> "In this case, the third process contains such a *notice on the face of it. The service of the process* on Foster and Thomson *was, therefore, a service of such notice,* and such service constituted a sufficient attachment of any credits and effects in their hands belonging to the respondent."

This is exactly what was done in the case at bar.

The third process, referred to in the opinion,

> "commanded the marshal to cite the respondent, if found in this district, and, if he could not be found, to attach his goods and chattels to the amount sued for, and, if such property could not be found, *to attach his credits and effects to the amount sued for, in the hands of Foster and Thomson and the assistant treasurer of the United States, his garnishees.*"
>
> (6 Fed. Cs., p. 1018.)

This process was almost identical in form with the process in foreign attachment which was served in the present case, which read:

> "Now, therefore, we do hereby empower, and strictly charge and command you, the said marshal, that you warn the said respondent, if it shall be found in your district, to be before the said District Court of the United States, at the United States Postoffice Building, in the City and County of San Francisco, on the 6th day of May, 1919, at 10 o'clock a. m., then and there to answer the said libel, and to make its allegations in that behalf; and if the said respondent cannot be found in your district, we further command you that you attach its goods and chattels in your district to the amount sued for, and if no goods and chattels can be found, *that you attach his credits and effects* to the amount sued for, *in the hands of American Trading Company, and of Wolff Kirchman & Co., garnishees,* and of any other garnishees having credits and effects of said respondent in hand; and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf; and have you then and there this writ, with your return thereon."
>
> (Apostles, p. 31.)

The opinion in the above case also states (pp. 1018-19):

> "An objection is taken to the first two processes, because they do not on their faces contain a citation to the garnishees. I do not think that is necessary. The attachment of the credits and effects in the hands of the garnishees may be made, as before stated, *by actual levy on or arrest thereof, or by notice.* The *notice*

> *need not be in the process.* But the return should show how the attachment was made. Inasmuch as, in the first two processes, *there is no citation to the garnishees, the returns to those processes should show that the notice before specified was given to the garnishees.*"

This opinion was written in the year 1870, many years before the admiralty rules were amended so as to require the notice to be stated in the process. Yet the reasons for the notice were as true then as they are today. Note, that the first two writs which were issued did not contain a notice on their face, and the court held that the marshal's return must show that notice had been given to the garnishees. The third writ, however, *contained the notice to the garnishees on its face*, and as we have stated, in the same form as the writ which was issued in the present case. The court held *that the service of the third writ was service of notice.*

Similarly, in the case at bar, the service of the writ was the service of notice.

Rule 31 of the old New York rules provided:

> "On the return by the marshal of *service of such attachment by notice and copy* with the reason thereof, the libelant," etc.
>
> (Dunlap's Admiralty Practice, p. 333.)

Here is a reference to the notice in the old rules which were adopted in *1838.*

When the old New York rules were revised, Rules 30 and 31 were combined to make the present Rule 13, and the reasonable and plausible explanation of the present wording is that the words "with notice

of the property attached" were taken from old Rule 31 and were used to make Rule 13 harmonize with Rule 9, which required that "the names of the garnishees and the specific property in their hands shall be stated in the * * * process."

A comparison of the two rules will show that the California rule was copied verbatim, with the omission of the word "trustee," from the New York rule, and the statement in the preface to the District Court rules is further evidence of the same:

> "The present rules in admiralty have likewise been framed upon the rules in admiralty of the Southern District of New York, adopted February 1, 1913, with such changes as our local practice seemed to justify."
>
> (Preface to District Court Rules, p. v.)

The District Court was of the opinion that the change in the rules was to make the practice conform to the state practice of serving a separate notice of the property attached, and stated:

> "This manner of service conforms both here and in New York to the manner of service of an attachment in each state. There are many decisions in each state holding that the giving of a notice of the property attached is essential to a valid garnishment."
>
> (Apostles, p. 52.)

The state court decisions which are referred to in the opinion must be considered in connection with the state statutes relative to attachment. Section 540 of the California Civil Code of Procedure, provides:

> "§ 540. Writ of attachment. If more than one defendant. The writ *must be directed to the sheriff* of any county in which property of such defendant may be, and *must require him to attach and safely keep all the property of such defendant* within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand against such defendant; *the amount of which must be stated* in conformity with the complaint, unless such defendant give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand against such defendant, besides costs, or in an amount equal to the value of the property of such defendant which has been or is about to be attached; in which case to take such undertaking."

This section does not require that the writ shall contain any mention of the garnishees or notice of the property to be attached.

The service of such a writ, without any additional notice, would not give a garnishee any information whatever except that the sheriff had been ordered to attach property of the defendant to the amount sued for. It is necessary, therefore, in order to give the garnishee information regarding the property attached, and to guide the sheriff in making a levy, that, in addition to the writ, a notice of the property attached be served upon the garnishee.

Section 542, Subd. 5, of the California Code of Civil Procedure, provides:

> "5. Debts and credits and other personal property, not capable of manual delivery, *must* be attached by leaving with the person owing

such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, *a copy of the writ, and a notice that the debts* owing by him to the defendant, or the *credits* and *other personal property* in his possession, or under his control, belonging to the defendant, *are attached in pursuance of such writ,* except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property."

This section is quite different from the admiralty rule which holds that a sufficient service is made by leaving a copy of the process with notice of the property attached.

Similarly, Sec. 649 of the New York Code of Civil Procedure, Subd. 3, provides that property incapable of manual delivery may be attached

> "by leaving a *certified copy of the warrant and a notice* showing the property attached with the person holding the same."

The process of foreign attachment in admiralty differs materially from the form of the state court writ. Admiralty Rule 9 of the District Court Rules, provides:

> "Mesne process may be either in personam or in rem, or both, and shall be issued by the clerk. Process in personam may be: (1) a simple citation in the nature of a summons to appear and answer to the suit; (2) such a citation, with a clause therein that if the respondent cannot be found, his goods and chattels to the amount sued for be attached; (3) such a citation and attachment, together with a clause of

> foreign attachment of the respondent's property and credits to the amount sued for in the hands of garnishees named therein. *The names of the garnishees and the specfic property in their hands shall be stated in the libel or petition and in the process, and the garnishees shall be cited to appear and answer on oath.*"

The marshal is directed by the process to attach *specific property* in the possession or under the control of *garnishees named in the writ.* No such provision is found in the state court process. It is apparent that when process of the form required by Rule 9, is served upon a garnishee named in the writ, that garnishee has actual notice of the property attached. It is therefore unnecessary that a separate and distinct notice, repeating the statements contained in the writ be also served upon the garnishee. The reason for the rule, the giving of notice to the garnishee, has been accomplished by the service of the writ. There is no reason for the service of an additional and separate notice, and, "when the reason of a rule ceases, so should the rule itself."

The notice which is required to be given *is notice to the garnishee,* and not notice to the respondents. The garnishee, Wolff, Kirchmann & Co., after having been served with the process of foreign attachment, answered as follows:

> "That at the date the United States Marshal handed it a copy of the writ herein, it had no goods and chattels or credits and effects belonging to said W. R. Carpenter & Co., Ltd., a corporation, respondent in the above-entitled action, nor has it since had any; that said W. R. Carpenter & Co., Ltd., a corporation, owns

> 300 shares of stock of said Wolff, Kirchmann & Co., Inc., of a par value of $100 each; that said shares of stock are fully paid up.
> Dated, May 22, 1919."
> (Apostles, p. 35),

and subsequently amended its answer by adding the following sentence:

> "That at the time of the receipt of said copy of said writ the said W. R. Carpenter and Co., Ltd., appeared in the books and records of the said Wolff, Kirchmann and Co., Inc., as the owner of said 300 shares of stock.
> Dated, July 10th, 1919."
> (Apostles, p. 37.)

This answer shows conclusively that the garnishee had *notice of the property attached,* and which the libelants were seeking to attach by the service of the writ. There was no doubt in the mind of the garnishee, when the writ was served, that the marshal was levying upon credits and effects of the respondent in the custody or under the control of Wolff, Kirchmann & Co. The purpose of the notice had been fulfilled. The rule states that it is sufficient service "to leave a copy * * * with notice of the property attached." What clearer proof can be produced than the answer of the garnishee showing actual notice? We have pointed out that the writ conformed to the requirements of Rule 9 by naming the garnishee and the property which the marshal was directed to attach.

In view of the actual notice received by the garnishee as shown by its answer, we do not see how

it is open to respondent to come into court, represented by the same counsel who appeared for the garnishee, and more than two years after the writ was served, attack the service upon the ground that the garnishee had not received notice of the property attached.

We desire to call the court's attention to an affidavit by William Denman, Esq. (proctor for respondent), which was filed in support of the motion to dismiss the American Trading Company attachment. The affidavit states, in part:

> "That at the time of said two attempted attachments or garnishments of credits of the respondent in the hands of the American Trading Company, *the deputy marshal, Mr. Maguire, had never made such service,* and did so in the absence of Mr. Burnham, chief deputy in charge of such services of the United States marshal's office in this District; *that he was unfamiliar with the methods of said service,* and did fail to serve any notice whatsoever of the credits attached at the time he handed to the representative of the American Trading Company the writ returned herein; *that he was so unfamiliar with the acts constituting a proper service* that he did not know how to make a return upon the writ; that on account of the absence of Mr. Burnham from the office, he delayed making his return for many months awaiting his advice as to the method of making the return; that the return in question was finally drafted, but antedated to the date of the attempted attachments; that the return was actually made by filing the writ with the clerk of the said court on or about the last of December, 1919, that is, over seven months after the time of the acts recited in the return."
>
> (Apostles, p. 42.)

By counsel's own statement the alleged irregularity in the service of the writ was due to the fact that the deputy United States Marshal on duty was inexperienced and unfamiliar with the manner of serving process as counsel claims it should have been served. That is to say, libelants must suffer because an inexperienced officer of the court failed to give a particular *form* of notice, notwithstanding that the record clearly shows that the *substance* of the notice had been conveyed, and that the garnishee had actual notice and made an answer based upon such notice. The fact of actual notice has not been denied.

If the form of notice prescribed by the proctor for the respondent had been given, the result would have been exactly the same. It is a harsh rule, extremely unfair to libelants, and not within the spirit of admiralty practice, to hold that, under the circumstances, a separate form of notice should have been served, because a separate form is required by the state practice under a very different statute, and in connection with a different form of writ.

It must be conceded that the garnishee, upon receipt of a copy of the writ, had actual notice of the levy. This is borne out by the answers filed by the garnishee. The objection of counsel, therefore, is an objection to the form and not to the substance, and is a mere quibble over technicalities which is decidedly out of place in an admiralty cause.

Sec. 954, Revised Statutes provides:

> "(Defects of form—amendments.) No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

This section is not confined to civil cases at law, but extends to all civil cases.

> *Dancel v. United States Shoe Machinery Co.,* 120 Fed. 839.

In re Griggs (C. C. A. 8th), 233 Fed. 243, the court held:

> "The authority of the courts of the United States under section 954, Rev. Stat. (Comp. St. 1913, 1591), is of the very broadest character, and while it cannot be employed to supply a lack of jurisdiction it covers every step of a case from summons to judgment. McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171. The corresponding section of the Judiciary Act of 1789 (1 Stat. 91) '*was designed to free the administration of justice in the federal courts from all subtle, artificial and technical rules and*

modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits'.'' (p. 246.)

The libelants are entitled to have this cause determined according to the principles, rules and usages which belong to courts of admiralty:

> "The jurisdiction of the admiralty rests upon the grant in the Constitution, and the terms in which that grant is extended to the respective courts of the United States. The forms and modes of proceeding in causes of admiralty and maritime jurisdiction are prescribed to the courts by the second section of the process act of 1792. In the process act of 1789, the language made use of in prescribing those forms implied a general reference to the practice of the civil law; but in the act of 1792, the terms employed are, *'according to the principles, rules and usages, which belong to courts of admiralty, as contradistinguished from courts of common law.''*
>
> *Manro v. Almeida*, 10 Wheat. 473; 6 L. Ed. 369, 372.

We have made a very careful search for authorities which might have a bearing on this cause, and all that we have found are in support of libelants' position. We have already discussed the case of *Cushing v. Laird* (supra), which holds that when the notice was contained in the body of the writ, service of the writ was sufficient.

In *Gottesman v. Canada Atlantic & Plant S. S. Co.* (D. C., E. D. New York), 246 Fed. 956, the court held:

"Application is made to vacate a writ of foreign attachment, upon the ground that the *libelants did not comply with rule 7* of the United States Supreme Court Rules in Admiralty (29 Sup. Ct. XXXIX), *and procure a special order of court* for the issuance of the attachment.

It appears that an order was made by the court directing that process be issued to the marshal. Ordinarily, as set forth in Benedict's Admiralty, § 343, the judge, in order to pass upon the 'affidavit or other proof showing the propriety thereof', makes an indorsement upon the papers: 'Let process with writ of foreign attachment issue'. *In the present case this indorsement was not placed upon the papers,* and it is admitted for the purposes of the motion that *no judge gave any special direction to the clerk for the making of the order,* but that this was made in the usual form by the clerk, as if such direction had been given. *It was admittedly too late to issue a new process when the matter was called to the attention of the court,* inasmuch as by that time the respondent had appeared by attorney and could therefore be found in the district. Birdsall v. Germain Co. (D. C.), 227 Fed. 953.

When the point was called to the court's attention, an order was made by the District Judge denying an oral application to vacate the attachment. This court held that a special order had been made, and that the court could sanction the action of the clerk after as well as before the issuance of process, since the facts made it appear that the court was actually in session at the time the special order was entered upon the minutes, and that the clerk was following the usual practice of the court as to the jurisdictional facts upon which a judge would have directed the entry of the order, if it had been

brought to his personal attention. Bryan v. Ker, 222 U. S. 107; 32 Sup. Ct. 26; 56 L. Ed. 114."

In *The Horsa* (D. C., So. Car.), 232 Fed. 993, a libel *in personam* was filed against the owners of the steamship "Horsa" and a *monition in rem* was issued, under which the vessel was attached, being released later upon giving bond.

The respondent thereafter moved to dissolve the attachment upon the ground that the process was not in the form prescribed by the Admiralty Rules of the Supreme Court. The court said (pp. 996-7):

> "Whilst the form of the process is not in artistic form, yet it complied in the opinion of the court substantially with the requirements of rule 2 of the Rules in Admiralty. The vessel was seized, and the owners were notified by the marshal, and have appeared to the proceedings. *This is in effect exactly what would have resulted if the form had been different, and it had run in the shape of a warrant of arrest of the person of the defendants, with a clause that, if they could not be found, their goods and chattels should be attached to the amount sued for.*"
>
> * * * * * * *
>
> "To dissolve the attachment simply because the process in this case was not in the form in exact words of first directing the persons of the defendants to be arrested, and then following that with a clause, if they could not be found, to attach their goods and chattels, when there now is in the court the bond of the defendants, in consideration of which they secured the release of the vessel, that they would abide by the decree of the court, would be practically to deprive the plaintiff of all remedy. *The vessel has gone, its owners are citizens of a dif-*

> *ferent country, the vessel is without the jurisdiction, the owners are not themselves, and have no known property, in the jurisdiction, and to dissolve the attachment at this time would be to deprive the party injured of all remedy, when in reality the respondents have had full process and opportunity to be brought into and have their day in court.''*

These two cases turn upon the validity of attachment process in admiralty when there has been a failure to comply literally with the rules. In *''The Horsa''* a monition in rem was served instead of a writ of foreign attachment, yet the court refused to set aside the service.

The reasoning in that case is particularly applicable to the cause at bar. Note: "This is in effect exactly what would have resulted if the form had been different." So, in this cause, if a separate notice had been handed by the deputy marshal to the garnishee, containing a repetition of the information set forth in the writ, the result would have been exactly the same. The garnishee would have been none the wiser. His counsel would have made the same answer that was made to the present writ. How would the result have been different?

> "To dissolve the attachment simply because the process in this case was not in the form * * * would be practically to deprive the plaintiff of all remedy. The vessel has gone, its owners are citizens of a different country, the vessel is without the jurisdiction, the owners are not themselves, and have no known property, in the jurisdiction, and to dissolve the

> attachment at this time would be to deprive the party injured of all remedy."

Every word of the above applies to the situation of the appellants in this cause. And stronger yet: for the respondent waited more than two years before taking a step against the attachment.

Will this court sanction such an unprecedented departure from the principles, rules and usages of the courts of admiralty, in a matter of mere form, to the irreparable injury of the appellants?

It is respectfully submitted that the order of the District Court quashing the service of the attachment upon Wolff, Kirchmann & Co., garnishee, should be reversed; and the cause be remanded to the District Court for a hearing upon the merits.

Dated, San Francisco,
February 8, 1922.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellants.